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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001190-ME

G.C., FATHER — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE DURENDA LUNDY LAWSON, JUDGE
ACTION NO. 08-AD-00018

G.N.; R.N.; AND
S.J.C., A CHILD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER AND VANMETER, JUDGES.

VANMETER, JUDGE: G.C. appeals from an order and judgment entered by the Laurel Circuit Court, Family Division which terminated his parental rights in an adoption proceeding. For the following reasons, we affirm.

In March 2008, the child (S.J.C.) was placed in the home of her maternal great-grandmother and step-great-grandfather, following the arraignment

of her father (G.C.) and her mother (P.C.) on charges of manufacturing methamphetamine.[1] In April 2008, temporary custody of the child was given to the great-grandparents, and the child has resided with them ever since.

On July 20, 2008, the father was arrested on charges of burglary and unlawful imprisonment. He has been incarcerated since then, and is currently serving a nine-year prison sentence for conviction of those charges. On July 29, 2008, the great-grandparents filed the underlying petition seeking to adopt the child, pursuant to KRS[2] 199.470. Since the mother consented to the adoption, the petition requested the voluntary termination of her parental rights and the involuntary termination of the father's parental rights.

The father, who was represented by counsel, opposed the petition. The trial court conducted a hearing, during which the great-grandmother, both parents, and a social worker testified.[3] Subsequently, the court entered an order and judgment of adoption which terminated the mother's and the father's parental rights. The father appealed.

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[1] Although the drug charges ultimately were dismissed, evidently both parents admitted to the allegations during arraignment.

[2] Kentucky Revised Statutes.

[3] The record reflects that the Cabinet for Health and Family Services (Cabinet) conducted an investigation and filed a report pursuant to KRS 199.510, recommending that the petition be granted. The record also contains the report of a guardian ad litem, who recommended the adoption as being in the child's best interest.

On appeal, the father claims that the court erred by finding that the elements of KRS 625.090(2) were satisfied so as to justify the involuntary termination of his parental rights. We disagree.

Appellate review of an involuntary termination or nonconsensual adoption proceeding

> is confined to the clearly erroneous standard in CR[[4]] 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings. *V.S. v. Commonwealth, Cabinet for Human Resources,* Ky.App., 706 S.W.2d 420, 424 (1986).
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> "Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *Rowland v. Holt,* 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934).

M.P.S. v. Cabinet for Human Resources, 979 S.W.2d 114, 116-17 (Ky.App. 1998). *See also M.B. v. D.W.*, 236 S.W.3d 31, 34-35 (Ky.App. 2007).

KRS 625.090 provides, in pertinent part:

> (2) No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:
>
> (a) That the parent has abandoned the child for a period of not less than ninety (90) days; [or]
> . . . .
>
> (e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or

[4] Kentucky Rules of Civil Procedure.

> refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child[.]

First, the father argues that although the court's final written order reflects a finding of abandonment pursuant to KRS 625.090(2)(a), the order contradicts the court's oral findings during the hearing, when the court stated that it could not find that the father had abandoned the child. However, well-settled is the notion that "a written judgment takes precedence over any arguably contrary oral statements made by the court." *Terry v. Commonwealth*, 253 S.W.3d 466, 477 (Ky. 2007) (citing *Commonwealth v. Taber*, 941 S.W.2d 463, 464 (Ky. 1997) ("When there is an inconsistency between oral statements of a court and an order reduced to writing, the latter must prevail")). The reasoning for this rule has been articulated by the Kentucky Supreme Court as follows:

> [W]here there is an inconsistency between the oral statements of a court and that which is reduced to writing as the court's final judgment, the latter shall prevail and the former shall be disregarded. Such construction is essential to the operation of the Court of Justice for judges often voice views and opinions which may be inconsistent with their final judgments. If this Court should announce a rule whereby the comments of a trial judge could be used to impeach the effect of a court's final judgment, the result would be the destruction of any certainty as to the effect of judgments and a state of chaos in judicial proceedings.

Commonwealth v. Hicks, 869 S.W.2d 35, 38 (Ky. 1994). Thus, in this case, the court's final written order finding that the father had abandoned the child prevails over any oral findings.

Next, the father argues that the court erred by finding that, pursuant to KRS 625.090(2)(a), he had abandoned the child, since incarceration "for an isolated criminal offense may not constitute abandonment justifying termination of parental rights." *Cabinet for Human Resources v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 1995).[5] However, even without considering the period of time in which the father has been incarcerated, our review of the record reveals that clear and convincing evidence was produced to show that prior to his incarceration, from March until his arrest in July 2008 (a period of more than 90 days), the father failed to financially support the child, failed to exercise his supervised visitation rights, and generally had no contact with the child other than to say "hi" in passing.

We find it helpful to note the following discussion on the element of abandonment:

> In adoption proceedings parental rights are not severed merely because a child would have a better home elsewhere or because the natural parent may provide less parental care than the adopting parent. Nor are they severed because a parent has temporarily abdicated his parental responsibility in favor of a kindred, as appears to have been the situation in the case at hand. Rather, there must be proof that the natural parent has abandoned or neglected the infant as prescribed by the statute. Generally, abandonment is demonstrated by facts or

[5] The Court in *Rogeski* actually held: "Although incarceration for an isolated criminal offense may not constitute abandonment justifying termination of parental rights, incarceration is a factor to be considered[.]" 909 S.W.2d at 661.

> circumstances that evince a settled purpose to forego all parental duties and relinquish all parental claims to the child. Non-support does not itself constitute abandonment, especially where the child is supported by a volunteer, but it may be an element of abandonment.

O.S. v. C.F., 655 S.W.2d 32, 34 (Ky.App. 1983) (internal citations omitted).

In the present case, although evidence was presented to show that prior to March 2008, the father did in fact support the child and that since his incarceration, he has telephoned the child regularly, nonetheless, his lack of support for, and contact with, the child from March until July 2008 sufficiently evinces an intent to forego his parental duties for a period of more than 90 days. Therefore, the court's finding of abandonment is not clearly erroneous.

Next, the father contends that the court erred by finding that, pursuant to KRS 625.090(2)(e), he had not financially supported the child for a period of more than six months. However, a finding that the father had not financially supported the child for a period of more than six months is not necessary to justify the termination of his parental rights, since the court found that the father had abandoned the child under KRS 625.090(2)(a). Thus, we decline to address the merits of this claim of error.

The order and judgment of the Laurel Circuit Court, Family Division, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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